No. 29695 -- Erika L. Miller v. Monongalia County Board of Education, a political subdivision, John Doe and Jane Doe

Starcher, J., concurring:

**FILED**
**December 13, 2001**
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OF WEST VIRGINIA

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OF WEST VIRGINIA

I agree with the majority opinion's conclusion that the discovery rule tolls the 2-year limitation period contained in *W.Va. Code*, 55-2-15 [1923]. I write separately, however, to expand and clarify the majority's discussion of how the discovery rule is to be applied. Specifically, I believe the majority opinion "jumped the gun" in analyzing the plaintiff's case under *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992). Instead, I believe the case should have been analyzed under *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), to reach the same result.

We held in *Keesecker v. Bird*, 200 W.Va. 667, 682, 490 S.E.2d 754, 769 (1997) that there are four steps to determining if a claim is barred by a statute of limitation. The first step in analyzing any statute of limitation question is to determine the applicable statute. In the instant case, *W.Va. Code*, 55-2-15 mandated that an action for the injury caused to the plaintiff when she was a minor be filed within 2 years "after . . . becoming of full age."

"The second step in evaluating a statute of limitation question is to establish when the requisite elements of the alleged tort occurred, such that the cause of action 'accrued.'" *Keesecker*, 200 W.Va. at 683, 490 S.E.2d at 770. In the instant case, the appellant was 14 at the time Donald McIntosh inflicted sexual abuse upon her -- and as the cause of action technically "accrued" at that time, we determine in the instant case that she should have filed any lawsuit by her 20th birthday.

"The next step is to determine whether the plaintiff is entitled to the benefit of the ameliorative effects of the discovery rule." 200 W.Va. at 683, 490 S.E.2d at 770. The discovery rule tolls the statute of limitation until a claimant knows or by the exercise of reasonable diligence should know of his claim. Whether the discovery rule applies is determined, in tort actions, by the application of Syllabus Point 4 of *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).[1] The application of the discovery rule "tolls the statute of limitations until a plaintiff, acting as a reasonable, diligent person, discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation and injury." *Gaither*, 199 W.Va. at 714, 487 S.E.2d at 909.

"The last step in the statute of limitation analysis is to determine if the limitation period is tolled by some misconduct of the defendant." *Keesecker*, 200 W.Va. at 684, 490 S.E.2d at 771. This

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[1]Syllabus Point 4 of *Gaither v. City Hospital* states:

> In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

In wrongful death actions, the application of the discovery rule is governed by Syllabus Point 8 of *Bradshaw v. Soulsby*, ___ W.Va. ___, ___ S.E.2d ___ (No. 29004, December 10, 2001), which states:

> In a wrongful death action, under the discovery rule, the statute of limitation contained in *W.Va. Code*, 55-7-6(d) [1992] begins to run when the decedent's representative knows or by the exercise of reasonable diligence should know (1) that the decedent has died; (2) that the death was the result of a wrongful act, neglect, or default; (3) the identity of the person or entity who owed the decedent a duty to act with due care and who may have engaged in conduct that breached that duty; and (4) that the wrongful act, neglect or default of that person or entity has a causal relation to the decedent's death.

step is where the analysis espoused by Syllabus Point 3 of *Cart v. Marcum*[2] -- relied upon by the majority opinion -- comes into play. In *Cart v. Marcum*, we recognized that in some circumstances causal relationships are so well established that we cannot excuse a plaintiff who pleads ignorance. In those instances where a cause of action against a defendant is patently obvious, and the plaintiff cannot claim that through the exercise of reasonable diligence they were unable to discover the existence of a cause of action, a higher burden of proof is placed on the plaintiff. The only way a plaintiff can toll the statute of limitation in such circumstances is to make "a strong showing . . . that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." Syllabus Point 3, *Cart v. Marcum*.[3]

The analysis is that simple. A plaintiff should first determine the applicable statute of limitation, then when the cause of action truly "accrued." If the lawsuit was filed after the time period specified in the statute, the plaintiff can assert the discovery rule as stated in *Gaither v. City Hospital* or, in wrongful death actions, in *Bradshaw v. Soulsby*. As a last resort, the plaintiff can allege some

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[2]We stated, in Syllabus Point 3 of *Cart v. Marcum*, that:

> Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury.

[3]A studious observer will note that this Court stated one form of the discovery rule in *Cart v. Marcum*, and then stated a different, more lenient form of the discovery rule in *Gaither v. City Hospital*. While it is not perfectly clear, it appears that the Court, without specifically saying so, modified or overruled *Cart v. Marcum* in *Gaither v. City Hospital*.

Regardless of the Court's unstated intent, subsequent decisions such as *Keesecker* make clear that *Gaither v. City Hospital* is the preferred statement of the discovery rule; *Cart v. Marcum* governs only those cases where the plaintiff is compelled to allege some deed by the defendant concealed the cause of action from the plaintiff.

affirmative misconduct by the defendant prevented the plaintiff from knowing of the elements of their cause of action, as stated in *Cart v. Marcum*.

In the instant case, the majority opinion does not apply the analysis set forth in *Keesecker*. The majority opinion wholly bypasses the discussion of the discovery rule in *Gaither,* and applies the test set forth in *Cart v. Marcum*.

I would have made clear that, under the *Gaither v. City Hospital* analysis, the plaintiff did not know, nor could she have known, that the Monongalia County Board of Education knew of Mr. McIntosh's criminal proclivities but took no steps to protect the plaintiff and other schoolchildren similarly situated. In other words, applying *Gaither v. City Hospital*, the plaintiff knew, by her 20th birthday, that she had been injured at age 14. However, she did not know, nor should she have reasonably known, that the Board of Education knew of Mr. McIntosh's misconduct and had a duty to protect the plaintiff, but breached that duty by giving Mr. McIntosh unfettered, unsupervised access to the plaintiff and other children. She apparently also did not know, nor should she have reasonably known, that the school board's actions may have proximately caused her injuries. Accordingly, under the discovery rule, the plaintiff's cause of action was tolled until she discovered the Board of Education had a duty, breached that duty, and thereby proximately caused her injury.

With the proviso, as we stated in *Keesecker*, that the *Gaither v. City Hospital* analysis should be used before resorting to the *Cart v. Marcum* analysis when looking at cases under *W.Va. Code*, 55-2-15, I concur with the majority's opinion.